No. 89-303

In The

Supreme Court of the United States

October Term, 1989

THE STATE OF TEXAS,

Petitioner,

v.

KENNETH JOSEPH SMITH,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The First Supreme Judicial District Of Texas At Houston, Texas

MEMORANDUM FOR THE RESPONDENT, KENNETH JOSEPH SMITH IN OPPOSITION

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MEMORANDUM FOR THE RESPONDENT, KENNETH JOSEPH SMITH IN OPPOSITION

Petitioner contends that an opinion from Texas Court of Appeals incorrectly reversed Respondent's conviction for driving while intoxicated holding that the trial court erred in admitting the audio portion of a videotape into evidence. The Court of Appeals ruled that a custodial interrogation of Respondent continued after the Respondent requested a lawyer to help him decide if he should answer the questions of the police interrogator in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981). Petitioner

claims that such request was selective and that Respondent was given reasonable access to call a lawyer.

1. Following a jury trial in a Harris County Criminal Court in Houston, Texas, Respondent was convicted of driving while intoxicated, a misdemeanor. The Respondent had been arrested and taken to the Houston Police Department for videotaping and questioning by the Houston Police. Before the questioning began, Respondent was given his legal warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). After performing sobriety tests, Respondent was asked whether he wished to contact an attorney before answering a few questions.[1]

The following exchange between the officer and Respondent was as follows:

> POLICE OFFICER: "Now sir, at this time, I'd like to ask you a few questions. Keeping your legal warning in mind you do not have to answer these questions if you do not wish to do so. Would you like to answer a few questions for me sir?"
>
> APPELLANT: "I can't say yes sir."
>
> POLICE OFFICER: "Yes sir, you can answer them if you'd like."
>
> APPELLANT: "I can answer you sir, but I can't say yes to all the questions without my lawyer, sir."

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[1] The State does not contend that Respondent was not in custody nor does the State contest that the complained of audio portion of the videotape was interrogation as defined by both Texas and Federal case law.

POLICE OFFICER: "I see, would you like a lawyer? Would you like to call your lawyer?"

APPELLANT: "Yes sir."

POLICE OFFICER: "Okay, there's a telephone there."

APPELLANT: "I don't know my lawyer's number, sir. My friend knows my lawyer's number."

POLICE OFFICER: "There's a phone book there also. You're only allowed to call your attorney. You're not allowed to call friends or relatives. You'll be able to do that if you're placed in the city jail. You'll be given that opportunity when you get over to the jail. Here you're only allowed to call your attorney."

APPELLANT: "I'm sorry sir, I can't call my attorney cause I don't know his number."

POLICE OFFICER: "Okay, there is a phone book there if you'd like to look it up."

APPELLANT: "My friend knows his number sir, I don't have any problems, just my friend knows his number."

POLICE OFFICER: "Do you know his name?"

APPELLANT: "No sir, my friend that I was driving with has a lawyer. I don't know his number."

POLICE OFFICER: "Okay sir, if you'd like to look in the phone book for another lawyer, you have that right. Feel free to do so at this time."

APPELLANT: "No sir, it wouldn't do me any good. I don't know my lawyer's number."

POLICE OFFICER: "All right sir, do you realize are you willing to answer any questions for me?"

APPELLANT: "Yes sir."

POLICE OFFICER: "Keeping your legal warning in mind, you do not have to answer them if you do not wish to do sir."

APPELLANT: "I won't answer the ones I don't feel like."

The custodial interrogation contained a number of incriminating questions such as what the Respondent had to drink, what medication he was on, whether Respondent felt he was intoxicated, and other questions designed to incriminate the Respondent.

Respondent refused to take a breath test and when informed that he would lose his driver's license for ninety (90) days, the following conversation took place:

APPELLANT: "Does this mean I cannot contact an efficient lawyer?"

POLICE OFFICER: "No sir, you can still have the opportunity to call a lawyer if you like at this time."

APPELLANT: "I just don't have his number on me sir."

POLICE OFFICER: "Sir, if you want to when you get over to the jail, you'll be given the opportunity to contact anyone you want, however many phone calls you need to make. You understand?"

APPELLANT: "That's all I need."

POLICE OFFICER: "Okay, are you willing to take the breath test? Yes or no?"

APPELLANT: "Without my lawyer present? No sir."

POLICE OFFICER: "At this time, I need you to sign your name indicating that you have refused to take the breath test."

APPELLANT: "Does it say without my lawyer present, sir?"

POLICE OFFICER: "Excuse me?"

APPELLANT: "Does is say without my lawyer present?"

POLICE OFFICER: "No sir, you still have to sign."

APPELLANT: "Then it doesn't matter, does it."

POLICE OFFICER: "Do you wish to sign it sir, I just have to have it – "

APPELLANT: "Not without my lawyer present. I can't give up any rights."

Prior to trial, the Respondent had filed a motion to suppress the audio portion of the videotape concerning the above described interrogation citing violations of the Fifth and Sixth Amendments. The trial court overruled the motion expressing the belief that Respondent had waived his right to counsel by not being silent when the questioning continued after being told he could not call his friend to get the name and telephone number of his lawyer.[2]

On appeal, the Court of Appeals agreed with the Respondent's position that his request for a lawyer was unequivocal and not limited. That Court found the Respondent had in fact invoked his right to counsel and

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[2] The entire hearing on the motion to suppress has been placed as Appendix A to this response.

that thereafter all interrogation should have ceased. *Smith v. State,* 754 S.W.2d 310, at 312 (Tex. App. – Houston [1st Dist.] 1988).

2. Petitioner argues (Petition, Pg. 9) two reasons for granting the writ. First, Petitioner argues that the Respondent's statements showed a willingness to answer some questions without counsel and therefore no *Edwards* violation occurred.[3] Second, the Petitioner argues that the police complied with *Edwards* by offering the use of a telephone and directory even though the Respondent was prohibited from calling a friend for the name and number of an attorney.

RESPONSE TO PETITIONER'S FIRST CLAIM

A review of the videotape and transcript show that the Respondent's request for counsel was unequivocal and unambiguous and further that his statement would lead an ordinary person to understand that he wanted to deal with the police questioning through a lawyer. The conversation also shows that Respondent did not affirmatively announce a willingness to speak with his interrogator until after he stated he wanted counsel. Finally, the conversation shows that the policeman initiated the questioning after Respondent was told he could not call a

[3] The Petitioner's position at trial was that the Respondent did not properly invoke his right to a lawyer bacause he did not get on the phone when he had the opportunity to do so. [App. 1].

friend to get the name and telephone number of his friend's lawyer. The primary purpose of the *Edwards* rule, which renders inadmissible any confession resulting from police initiated questioning after the accused has invoked his right to counsel, is to protect the accused from overreaching or coercion on the part of the police. In fact, the Trial Judge did not construe Respondent's answers prior to his request for a lawyer, as meaning that he [the Respondent] was willing to answer some questions without a lawyer present.[4]

The Court of Appeals discussed the State's position that this was only a partial invocation of counsel, pointing out that hypothetically even if that interpretation was true, the burden was on the State to show that Appellant specifically and affirmatively waived his right to counsel. (*Smith v. State*, supra at Pg. 312).

DID THE RESPONDENT'S STATEMENT PRECEDING AN UNEQUIVOCAL REQUEST FOR A LAWYER INDICATE A WILLINGNESS TO PROCEED SELECTIVELY WITHOUT A LAWYER TO SOME OF THE QUESTIONS?

Petitioner argues that the most logical interpretation of Respondent's statement is that he was willing to answer some questions without conferring with counsel. There is nothing ambiguous or equivocal about

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[4] The trial court agreed with Respondent that he invoked his right to counsel but then concluded because the Respondent agreed to answer some questions after being told he could not call a friend to get his lawyer's name and telephone

(Continued on following page)

Respondent's request that he "can't say yes" (that he will answer the question put to him by Officer Blaine) without his lawyer. Even a layman would interpret this phrase as a request for a lawyer's advise before deciding whether to say yes that he would answer a particular question, some of the questions, or all of the questions. The Petitioner compares this situation with that of *Connecticut v. Barrett*, 479 U.S. 523 (1986), where Mr. William Barrett agreed to give an oral statement without a lawyer but would not give a written statement without one. This was held to be a limited request. Nowhere does the Respondent indicate a willingness at this point to answer any questions without his lawyer present. Respondent stated affirmatively and without hesitation or equivocation that he wanted a lawyer before proceeding with the interrogation. When prompted by the officer that he could answer them if he [the Respondent] liked, the Respondent goes on to assert that he knows he could answer but he can't say he would like to answer without his lawyer.

Petitioner urges the Court to look at Respondent's subsequent answers to questions to find a partial invocation. It is undisputed that the police officer initiated the conversation after preventing Respondent from calling a friend to ascertain a lawyer's name and telephone number.

(Continued from previous page)

number, that he waived his right to counsel. [App. 3-4]. It is clear that the trial court blended the right to counsel and waiver issue together and then used an incorrect analysis when he concluded "I think that his option is either to invoke his right to have an attorney present during any conversation with the police or be quiet." [App. 4].

> POLICE OFFICER: "All right sir, do you realize are you willing to answer any questions for me?"
>
> RESPONDENT: "Yes Sir."
>
> POLICE OFFICER: "Keeping your legal warning in mind, you do not have to answer them if you do not wish to sir."
>
> RESPONDENT: "I won't answer the ones I don't feel like."

Here clearly the *Edwards* rule has been violated. Only if the suspect initiated the conversation can the waiver issue be considered. *Id.* at 486. Reviewing the totality of circumstances, as the concurring opinion in *Edwards* favored over the two-step analysis, no waiver is shown because the Respondent was still asking for a lawyer at the end of the interview.

> POLICE OFFICER: "Do you wish to sign it sir, I just have to have it – "
>
> APPELLANT: "Not without my lawyer present. *I can't give up any rights.*[5]

This Court applied *Edwards* to its decision in *Smith v. Illinois*, 469 U.S. 91 (1984), holding that a valid waiver of an accused's right to counsel cannot be established by showing that the accused responded to further interrogation. The waiver analysis depends in each case upon particular facts and circumstances, including background, experience and conduct of the accused. See also *Rhode Island v. Innis*, 446 U.S. 291 (1980), where right to be free from interrogation exist until defendant had consulted with a lawyer.

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[5] Emphasis supplied by this writer.

In this case there is no need to grant this writ because the whole premise as to the State's first position is founded upon assertions that were neither found to be factually correct by either the Trial Court, Court of Appeals, or the Texas Court of Criminal Appeals.

RESPONSE TO PETITIONER'S SECOND CLAIM

3. The second reason [Petition Pg. 17] advanced by the Petitioner for granting the Writ is stated in the proposition that an offer for use of a telephone and telephone directory constitutes total compliance with Respondent's request for an attorney.

The Petition asserts [Petition Pg. 20] that this question was never addressed by either the Court of Appeals or the Texas Court of Criminal Appeals and that this Court should now answer it affirmatively. Having found that the police continued to question Respondent in violation of *Miranda* and *Edwards* the Court of Appeals did not address the issue of availability because it resolved the first request for counsel as mandating a termination of the interview until consultation or presence of counsel.

Petitioner argues that because a conflict exists in appellate courts of different states that this Court should decide what "access" to an attorney means. Further, Petitioner complains that at least in driving while intoxicated cases, access should be limited so that a delay in post-arrest procedures will not occur. [Petition, Pg. 18]. Finally, Petitioner argues that it was Respondent's burden to present evidence that he could have obtained counsel quickly from his friend. [Petition, Pg. 21, n. 11] Here the Respondent was not allowed to exercise his right to counsel and thus the answers to the police interrogation were

obtained in violation of the Respondent's constitutional rights. See *Silva v. Estelle*, 672 F.2d 457 (5th Cir. 1982). Since the Respondent was not allowed to make a short phone call to his friend, one can only speculate as to what would have been obtained.[6] The police chose to put a condition on the right to contact a lawyer; they should not be able to complain now. Hypothetically, if a lawyer had been contacted over the phone, would the police have terminated all questioning until he was present? Could the lawyer have provided meaningful advise on the telephone knowing his client was being taped and at least one police officer could hear the client's side of the conversation? Is this "access" under the meanings of *Miranda* and the attorney-client privilege? See *State v. Holland*, 711 P.2d 592 (Ariz. 1985) and *Farrell v. Municipality of Anchorage*, 692 P.2d 1128 (Alaska, App. 1984), for the amount of privacy deemed necessary for *confidential* communications.

The Respondent wanted counsel to help him decide whether to answer questions designed to elicit possible incriminating responses. Does the Petitioner argue that this procedure could have been accomplished by the policeman and accused in the videoroom and the attorney at home on his phone at four o'clock at night? As long as the request for counsel does not unreasonably impede police processing, it should be honored. See *Brosan v. Cochran*, 516 A.2d 970 (Md. 1986) for the right to have counsel *present* in a driving while intoxicated case. Further, the interrogation of the Respondent at this point

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[6] Houston police officers have allowed driving while intoxicated suspects telephone calls to their spouses to find a lawyer. See *McCambridge v. State*, 712 S.W.2d 499 at 500, n. 3 (Tex. Cr. App. 1986).

could hardly be considered necessary to the normal activities associated with "booking procedures".

The Respondent never argued nor is it a issue whether a suspect need be counseled prior to taking a breath test. At issue here is whether he should have continued to be questioned after asking for the assistance of lawyer when police put a condition on that request. The Court should not address the second question because it is a factual controversy and is not ripe for review.

The Court of Appeals' Opinion was correct in both its factual and legal interpretation and its subsequent reversal and remand was proper.

CONCLUSION

It is therefore respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

(TRANSCRIPTION OF MOTION TO SUPPRESS)

(p. 5) MR. BROWN: Your Honor, at this time the State would like to offer State's Exhibit No. 1, the video tape. It is an agreement with Counsel to stipulate –

MR. TURNER: May we approach the bench, Your Honor?

(Whereupon a discussion was held at the bench out of the hearing of the jury.)

MR. TURNER: For the record, I would agree he would not have to lay the predicate, but I not waive the motion that we have on file contesting a portion of the audio. I think the Court is going to need to look at the video to be able to rule on the motion. So I don't have any objection to him introducing it, but –

THE COURT: You are waiving any (p. 6) predicate?

MR. TURNER: Waiving the predicate.

THE COURT: What is your position? What are you objecting to?

MR. BROWN: I don't believe that he properly invoked his – they gave him an opportunity to call an attorney and he did not – they gave him the opportunity and he said I would like to call my lawyer and they gave him the opportunity to get on the phone and he did not. He didn't know his name, didn't know the phone number.

THE COURT: Bailiff, take the jury out, please.

(Whereupon the jury exited the courtroom.) (Whereupon the video was played out of the presence of the jury.)

MR. TURNER: There is no question. You heard after his admonition, you heard him say that he wanted a lawyer and they said you can go to the phone and call a (p. 7) lawyer and he told the police officer he did not know the name or number of the lawyer but his friend did. He said also before that he can't make a decision on whether to answer and then the police officer asked him to call the lawyer and he said you can't call your friend to find out the name of the lawyer and then after three or four more sentences, gets him to invoke some type of waiver of his right to answer the questions.

I feel like under Arizona – *Edwards v. Arizona*, once he makes the initial request for a lawyer, any questioning along those interrogation lines of "Were you drinking," "Did you have an accident," "Were you driving," those kind of things that he should have at least had reasonable opportunity to get a lawyer.

I am not aware that the law says if you don't know the name of your lawyer that you can't call a friend to find out who your lawyer is or who a good lawyer is and he invites him to wander through the phone book and find the name of any (p. 8) attorney to call, presumably at 3:00 o'clock at night.

My position would be once he makes the first request, any waiver later on is tainted unless it is just clear and equivocal that he waives his right and he never says he waived any right to have an attorney and he would answer those questions.

The police officer simply says "Well, you can use the phone and call him," and then when he doesn't do that, rather than terminate any more questioning, he goes and he keeps questioning him about "Were you driving," and I feel that once he makes the request for a lawyer, that he is invoking his right to have a lawyer present and regardless if he can find one and get one down there at that minute or get one on the phone, that any questioning should have ceased at that time.

I think that is what *Edwards v. Arizona* says, because that was a case where he made a request for a lawyer and kept at him until he made a confession.

(p. 9) THE COURT: What is the Texas case on that?

MR. TURNER: I can find it for you over the lunch hour.

THE COURT: We will pass that over the lunch hour.

MR. TURNER: I apologize. I would represent to the Court that we have applied *Edwards vs. Arizona* in virtually every DWI decision that I have seen come down where there is a request made. There was the case out of Dallas –

THE COURT: That's the one.

MR. TURNER: I want to say – I just can't remember the name.

THE COURT: I am going to overrule the objection. McCambridge cites *Edwards*. The question seems to be – the question, I think, is whether or not once invoking the right – and I believe he did – whether it can then be waived and I think the Court of Criminal Appeals in

McCambridge points out once a suspect has invoked the right to counsel, any subsequent conversation must be initiated by him. I heard the Defendant (p. 10) invoke his right to counsel. I heard the conversation and I –

MR. TURNER: I think it's obvious from the tape that the Defendant did not initiate the inquiry.

THE COURT: The point that you make concerning his ability to call the attorney himself or call a friend with the number, I think that his option is either to invoke his right to have an attorney present during any conversation with the police officers or be quiet.

MR. TURNER: And the officer terminating any type of further questioning.

THE COURT: I will let you cover that in your brief.

MR. TURNER: I won't argue with the Court.

THE COURT: I think the option is for him to invoke his right, have the attorney present or be quiet.

Now, there was discussion about not knowing the number and not being able to contact a friend who might know the (p. 11) number; but then I heard the officer say "Now, you are not going to be able to do that. Do you want to answer these questions anyway?" And he said, "Yes," and so I am going to rule that –

MR. TURNER: He said some of them. The ones that I choose to answer. And then he answered a few and on one he maintains a silence on a scale of zero to ten and the officer comes back and says, "Do you want to answer that?" And he says, "Do I have to?" And the officer says –

he goes on and gets him to say on a scale of "I am probably a zero three."

THE COURT: I heard the dialogue. I heard the dialogue and I think it was clear that he didn't have to answer and if he chose not to talk to the police officer without his lawyer, I think he had the opportunity to do so and I think he specifically elected to go ahead and talk to him. So that's how I am ruling.

MR. TURNER: So to the Motion to Suppress the audio part after he – after that?

(p. 12) THE COURT: That's correct. The only thing that I would suppress would be anything that he said, not specifically the audio portion, but anything that he said after he invoked his right to a lawyer. But then my ruling is that subsequently he waived that and said "I am going to go ahead and talk to you anyway." Even though he understood that he had the right.

Let's proceed.

(Whereupon the jury entered the courtroom.)

THE COURT: Be seated.

The State has offered State's Exhibit 1. It is my understanding that the Defense is waiving the predicate and subject to the objections heretofore made would not require the State to call the witnesses to lay the predicate.

MR. TURNER: That's correct.

THE COURT: It will be admitted.